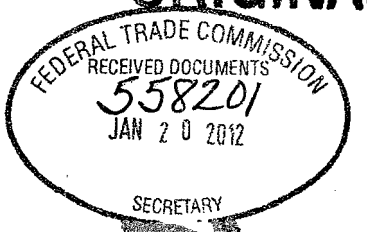
ORIGINAL



UNITED STATES

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INTRODUCTION

Wyndham Hotels and Resorts, LLC ("WHR") and its parent company, Wyndham Worldwide Corporation ("WWC" and, jointly with WHR, "Wyndham"), respectfully submit this Petition to Quash or, Alternatively, Limit the Civil Investigative Demand ("CID") issued by the Federal Trade Commission ("FTC" or "Commission") on December 8, 2011.[1]

The sequence of events that culminated in Wyndham's instant petition began nearly four years ago, when WHR became one of the thousands of American businesses, non-profits, and government agencies (the FBI and Department of Justice being the two late

included providing Staff with more than one million pages of documents in response to 29 separate document requests (including subparts) made by Staff; making five separate written submissions to Staff responding to 51 separate written questions (including subparts) that Staff had interposed; and making seven separate in-person presentations to Staff to provide additional information requested by Staff and to respond to additional questions raised by Staff.

Even more concerning, issuance of the CID occurred *after* the investigation had already reached a point where, according to Staff's own statements, the purpose of the investigation had already been accomplished. Specifically, the CID issued only *after* Staff told WHR that Staff believed its investigation had found reasonable ground to conclude that WHR had violated Section 5 of the Federal Trade Commission Act ("FTCA"); *after* Staff presented WHR with a proposed complaint setting forth the alleged Section 5 violation Staff believed it had uncovered; and *after* Staff demanded that WHR agree to a settlement of Staff's alleged Section 5 claim. In other words, by the time the CID issued, Staff had by its own admission already obtained everything it needed in order to move the matter beyond the investigatory phase.

Tellingly, the CID also issued *after*—indeed *just days after*—WHR submitted a white paper to the Director of the FTC's Bureau of Consumer Protection demonstrating the unlawfulness of the Staff settlement terms being objected to by WHR. Staff defended the timing of the CID by claiming that its investigation was for some reason not "complete," even though WHR had already responded fully to all Staff's voluminous, previously submitted discovery requests, and Staff had already concluded that corrective action should be taken by the FTC to address a supposed Section 5 violation by WHR. Thus, while ostensibly the CID is merely intended to enable Staff to obtain limited additional discovery that Staff thinks it still needs, even at this late juncture, to finish its longstanding investigation, WHR believes otherwise.

The CID itself proves this point. The CID does not merely target a few stray informational items that Staff may have somehow missed in its sixteen-month investigatory effort. Instead, as drafted, the CID would require WHR and WWC to respond to 89 further interrogatories, including sub-parts, and 38 further document requests (again including subparts). Moreover, almost every single discovery request in the CID has been drafted first to define the subject matter of the request as broadly as imaginable and then to demand a response containing a mind-numbing level of detail. Compliance with the CID would thus entail months of work and millions of dollars of expense.

Worse still, the CID is in large part duplicative of the discovery requests Staff previously made during the course of this investigation; takes no account whatever of the voluminous amount of information that WHR has already provided in response to those requests; and seeks to effectuate an eleventh-hour expansion of Staff's investigation beyond WHR's information security practices and into the information security practices of WHR's service providers and affiliates, even though to date Staff's investigation has revealed nothing whatever calling into question the information security practices of those other entities. Further, the CID is not based on a proper Commission investigational resolution; was not issued based on the required showing of need for invocation of compulsory process in an FTC investigation; fails to provide WHR and WWC with the statutorily specified notice of Staff's claim and legal theory; seeks information related to various issues that are beyond Staff's authority; and obviously was issued for an improper purpose—namely, to coerce WHR's acceptance of the unlawful settlement terms

being insisted on by Staff or, failing that, to obtain pre-litigation discovery from WHR in the guise of purporting to complete an investigation that, judged by any standard, should be considered to have been completed months ago.

Perhaps worst of all, the Staff investigation that is the subject of the CID has already established that the information security practices being investigated caused *no consumer injury* and any deficiency in those practices has already been *fully rectified*. Indeed, Staff's inability to prove consumer injury of the sort that normally is (or ought to be) the touchstone of an FTC enforcement action is so clear here that Staff does not even propose to assert an unfairness-based Section 5 claim. Instead, Staff's proposed complaint is limited to a deception-based Section 5 claim. But even that claim presents insignificant consumer protection concerns, for the claim is based solely on a privacy policy published on WHR's website that there is no reason to believe was ever even read, much less relied upon in making a purchasing decision, by any appreciable number of WHR customers (if, indeed, by any at all), and because the validity of Staff's deception claim depends entirely on Staff's tortur

The Intrusions

On three separate occasions during the period between June 2008 and January 2010, WHR and certain of the Wyndham-branded hotels suffered criminal intrusions into their computer networks (the "Intrusions"). During the course of the Intrusions, certain customer payment card data being handled by the intruded-upon hotels was placed at risk of compromise. Significantly, however, other than payment card data, no personal information of any consumer was placed at risk during the Intrusions. As a result, because payment card issuers protect their cardholders against suffering any financial injury by reason of their payment card data being compromised, the Intrusions did not cause, and could not have caused, any financial injury to any consumer.

Also, while the intruder(s) did gain access to

determine whether WHR's information security practices complied with Section 5 of the Federal Trade Commission Act ("Section 5").

The WHR Investigation proceeded for the ensuing 16 months. Because the Intrusions affected the networks of WHR and certain of the Wyndham-branded hotels, the WHR Investigation focused on the adequacy of the information security measures that were in place at the time of the Intrusions to protect personal consumer information being handled by the WHR network and the hotels' networks. In that regard, while the WHR Investigation did reveal that the intruder(s) had gained access to the networks of both WHR and certain of the Wyndham-branded hotels during the course of the Intrusions, the WHR Investigation revealed that only payment card data had been placed at risk of theft during the Intrusions. Payment card issuers, pursuant to their contracts with their cardholders, fully protect their cardholders from suffering any financial injury by reason of their payment card data being stolen. Thus, the WHR Investigation found no evidence that any *consumer* had suffered any financial injury by reason of whatever access to personal consumer information had occurred during the Intrusions.

Because there is no evidence that the Intrusions extended beyond WHR's network and the networks of the intruded-upon Wyndham-branded hotels, the WHR Investigation did not address, or have any reason to address, whether at the time of the Intrusions adequate security measures were in place to protect whatever customer data was located at WHR's affiliates and WHR's service providers. Indeed, as noted above, the Access Letter itself expressly stated that *WHR* was the proposed respondent in the WHR Investigation, and that the subject matter of the WHR Investigation was limited to *WHR's* information security practices. *See* Exhibit 3 hereto, page 1. Moreover, WHR is not aware of the FTC's having ever taken action, subsequent to the delivery of the Access Letter, to authorize the WHR Investigation's being expanded to extend to the information security practices of any of WHR's affiliates and/or service providers, or to notify WHR or any of its affiliates of any such expansion.

WHR cooperated fully with the WHR Investigation. To begin with, WHR produced to Staff over one million pages of documents in response to the 29 separate document requests (including subparts) contained in the Access Letter and ensuing Staff communications. All but three of those requests targeted either certain specified documents or documents "sufficient to show" certain specified matters. Each such "targeted document request" accordingly required WHR to engage in a file-research project to try to locate the particular documents that would meet the request. These file-research projects were, in the aggregate, enormously labor intensive and time consuming. For example, more than five months of work were required just to complete WHR's effort to locate the documents called for by the targeted document requests included in the Access Letter. Upon completing that effort, WHR reported to Staff that, with the exception of just two requests as to which no documents could be located, WHR believed it had succeeded in locating documents that satisfied all the Access Letter's 29 targeted document requests. Similarly, WHR believes it succeeded in locating documents that met all the targeted document requests contained in Staff's ensuing communications. Significantly, Staff has never once suggested it disagrees with WHR's view as to the completeness of WHR's response to Staff's targeted document requests.

Staff's document requests also included three requests that sought "all documents" responsive to the matter in question. In substance, those three requests sought all documents

relative to the Intrusions and to WHR's and the Wyndham-branded hotels' information security at the time of the Intrusions. WHR proposed, without any objection by Staff, that its primary effort to locate documents responsive to the "all-document requests" would be to review the electronically stored information ("ESI") of the personnel who had the most direct responsibility for handling those matters and who, as a result, were most likely to have custody of documents relating to those matters. To that end, WHR reviewed the ESI of one individual who played a central role in WHR's information technology function during the period in question, and a second individual who played a central role in WHR's information security function during that period. All responsive, non-privileged documents located by means of that custodian-based ESI review (which amounted to more than one million

and other consultants retained to assist WHR in dealing with the WHR Investigation exceeded $5 million. *Id*. Virtually all of these costs were expended in responding to the Staff discovery requests described above. And, of course, those costs give no account to the substantial amount of time expended by WHR's own personnel in doing the massive amount of research required to locate the documents and information sought by Staff's requests.

Staff's Proposed Complaint and Proposed Consent Order

During the course of the WHR Investigation, Staff advised WHR that Staff believed its investigation had adduced information sufficient to give the FTC reason to believe that WHR's information security practices were in violation of Section 5. On July 20, 2011, Staff provided WHR with a proposed complaint and a proposed consent order. Significantly, Staff's proposed complaint (the "Proposed Complaint," attached hereto as Exhibit 45) made no claim that WHR's information security practices were "unfair" under Section 5. Presumably, Staff recognized that, with payment card data having been the only personal information placed at risk of compromise in the Intrusions, Staff could not establish the substantial consumer injury necessary to sustain an *unfairness*-based Section 5 claim. Instead, the Proposed Complaint alleged only that WHR had committed a single *deception*-based violation of Section 5. Staff's theory, as set forth in the Proposed Complaint, was that two sentences contained in the privacy policy published on WHR's website since early 2008 (the "Privacy Policy") had expressly represented that reasonable security measures to protect customer information were in place at both WHR and the Wyndham-branded hotels. According to Staff's allegations, that representation was inaccurate because (as ostensibly shown by the occurrence of the Intrusions) neither WHR nor the Wyndham-branded hotels in fact had reasonable information security measures in place to protect customer information from criminal intrusion during the period in question.

The relief that Staff's proposed consent order (the most recent version of which ("Staff's Proposed Consent Order") is attached hereto as Exhibit 6) sought from WHR had three basic components:

1. a prohibition on WHR's making future misrepresentations of the sort alleged in the Proposed Complaint, as well as a variety of other future misrepresentations related to data privacy, confidentiality, security, and integrity (*see id*. at Part I);

2. a mandate that WHR (a) establish, implement, and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected by WHR from or about consumers and (b) arrange for an independent assessor to conduct biennial reviews designed to evaluate WHR's compliance with that program (collectively, the "Affirmative WHR Relief") (*see id*. at Parts II and IV.A - IV.D); and

3. a mandate that WHR (a) cause each Wyndham-branded hotel to establish, implement, and maintain its own comprehensive information security program, (b) assess, through WHR's Quality Assurance Program, each Wyndham-branded hotel's compliance with its program and take certain measures to address any instance of a Wyndham-branded hotel's non-compliance with such program, and (c) arrange for the independent assessor's reviews also to evaluate WHR's compliance with its monitoring and enforcement

responsibilities regarding the Wyndham-branded hotels' comprehensive information security programs (collectively, the "Affirmative Hotel Relief") (*see id*. at Parts III and IV.E).

The Proposed Complaint also alleges that WHM (the WHR affiliate that manages the

deception-based violation of Section 5;

second, WHR objected to those portions of the Affirmative Hotel Relief that would involve WHR's assuming direct responsibility for the Wyndham-branded hotel's information security in certain respects—*contrary to the fundamental business model that underpins franchising*; and

third, WHR objected to the Affiliate Relief (other than the portion of the Affiliate Relief

The CID

The CID did not come as a complete surprise to WHR. In October 2011, shortly after WHR's settlement negotiations with Staff reached an impasse and WHR asked to meet with BCP Management, Staff had orally advised WHR that Staff believed it needed certain additional information in order to complete its investigation and, to that end, intended to ask the FTC to issue a civil investigative demand to WHR. Thereafter, in late October, Staff had orally

the CID includes no fewer than *eighty-nine* further interrogatories and *thirty-eight* further document requests. The sheer volume of the discovery requests contained in the CID is exacerbated by the fact that the vast majority of the CID's requests duplicate, in significant part, one or more of the discovery requests previously made by Staff during the course of the WHR Investigation. Moreover, those of the CID's requests (or portions thereof) that do not duplicate Staff's prior requests instead seek, for the most part, information or documents that have nothing whatever to do with the subject matter of the WHR Investigation, such as documents and information relative to the information security practices of WHR's affiliates and service providers. Finally, almost every single discovery request in the CID has been drafted first to define the subject matter of the request as broadly as imaginable and then to demand a response containing a mind-numbing level of detail.

A case in point, by way of example only, is Interrogatory 12. As drafted, Interrogatory 12 purports to require Wyndham to describe in detail each and every aspect of any and all information security measures that Wyndham had in place at any time during the last four years, including the date on which each and every such aspect was implemented, each and every assessment, test, evaluation, monitoring action, or change that was made of or to any such aspect during such period, and the date of every such assessment, test, monitoring action, or change. No account is given in this interrogatory to the voluminous amount of information that Staff has already requested and received in regard to WHR's information security during the period in question. No effort is made in this interrogatory to zero in on any particular aspect of WHR's information security that Staff might have concerns about based on its investigation to date. Moreover, to the extent Interrogatory 12 seeks information not only relative to WHR's information security, but also relative to the information security measures that were in place at WWC, WHG, and WHM during the period in question, this interrogatory utterly ignores the fact that there is no reason whatever for the FTC to believe that any of these entities suffered from any information security deficiencies during the peri

up to this point[7] and as to which Staff has no basis no

the course of this investigation and the triviality of the supposed case that Staff has built against WHR by means of that investigation). Wyndham is therefore confident that the CID would be quashed in its entirety if the matter were to be litigated.

Nonetheless, consistent with its two-year history of cooperation with the WHR Investigation, Wyndham sought to negotiate modifications to the CID that would prevent it from unduly burdening Wyndham while at the same time still giving Staff plenty of ability to obtain from Wyndham any additional discovery that it might genuinely need to complete the WHR Investigation. Specifically, in the meet-and-confer conference relative to the CID that Wyndham and Staff conducted on January 6, 2012 pursuant to 16 C.F.R. § 2.7(d)(2),[8] Wyndham proposed that the CID be modified as follows:

> ***First***, with WHR's having already fully responded to no fewer than 51 interrogatories and 29 document requests during the course of the WHR Investigation, Wyndham proposed that the CID be limited to posing up to 10 more interrogatories and 10 more document requests—an approach that would still leave Staff with an aggregate total of 61 interrogatories and 39 document requests during the course of the WHR Investigation, as compared to the 25 interrogatory cap that applies to all federal cases under the Federal Rules of Civil Procedure.
>
> ***Second***, Wyndham proposed that the up-to-10 additional interrogatories and additional document requests that would be permitted under Wyndham's proposal be drafted by Staff so as to cure the three drafting defects that infect most of the CID's current discovery requests. Wyndham thus proposed that any additional interrogatories and any additional targeted document requests be drafted so as to:
>
> - avoid duplicating discovery requests Staff had previously made and WHR had already responded to;
> - exclude from their scope documents and information that have nothing whatever to do with the WHR Investigation, such as documents and information relative to the information security practices of WHR's affiliates and service providers; and
> - address the extreme breadth of most of the CID's current interrogatories and targeted document requests, and the extreme level of detail demanded by those interrogatories and targeted document requests, by instead seeking with precision particular documents and information that Staff has not previously requested, that reasonably relates to some specific concern that has arisen during the WHR Investigation, and that would reasonably be expected to be readily accessible to Wyndham.
>
> ***Third***, in regard to any "all documents requests" that Staff might include in the

[8] The statement required by § 2.7(d)(2) is attached hereto as Exhibit 9.

> revised CID, Wyndham proposed that Staff identify up to three additional custodians whose documents would be reviewed in order to locate documents responsive to any such requests.

See Letter of Douglas H. Meal to Kristin Krause Cohen, January 8, 2012, attached hereto as Exhibit 10 (memorializing proposal made by Wyndham during the meet-and-confer conference).[9]

Staff did not respond to Wyndham's January 6 proposal until January 12, 2012. *See* Letter of Kristin Krause Cohen to Douglas H. Meal and Lydia Parnes, January 12, 2012, attached hereto as Exhibit 11. Staff's response rejected virtually all of Wyndham's proposal, but invited further discussions in an effort to resolve Wyndham's objections to the CID. The next day, Wyndham responded by expressing a willingness to engage in further discussions of that sort, but noted that with Wyndham's deadline for filing a petition to quash the CID being now just a week away, Wyndham would be fully occupied during that week in preparing its petition, so further discussions relative to Wyndham's objections to the CID would have to occur after the petition was filed unless Staff were willing to extend that deadline so as to enable such discussions to occur immediately. Staff did not reply to Wyndham's communication, leaving Wyndham with no choice but to complete and file this petition.

ARGUMENT

Although the FTC has broad statutory authority under 15 U.S.C. § 45(a) to investigate practices that it determines may be deceptive or unfair when used in the course of trade, it is well established that FTC's subpoena power is not unfettered. Although Congress has provided the FTC with authority to conduct reasonable investigations through the use of CIDs, those CIDs are not self-enforcing, and federal courts stand as a safeguard against abusive CIDs. *See, e.g.*, *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) ("The federal courts stand guard, of cour

The Supreme Court, in *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950), established the standard for determining whether a CID should be quashed or limited. Although the Court enforced the decree that was before it in that particular case, it recognized that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *Id.* at 652. Accordingly, the Court instructed that agency subpoenas or CIDs should not be enforced if they demand information that is: (a) not "within the authority of the agency," (b) "too indefinite," or (c) not "reasonably relevant" to the inquiry. *Id.* This standard has been consistently applied by the courts. *See, e.g., SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980) (citing *Morton Salt*, 338 U.S. at 653) (confirming that "[t]o obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met"); *Arthur Young & Co.*, 584 F.2d at 1030-31 (noting that the subpoena request must "not [be] so overbroad as to reach into areas [that] are irrelevant or immaterial" and that specifications must not exceed the purpose of the relevant inquiry) (internal quotation marks and citation omitted).

In applying the *Morton Salt* standard, the costs and burdens imposed on the target of a CID also must be considered. *See, e.g., FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (a party challenging a subpoena can do so by showing the compliance costs are overly burdensome or unreasonable); *Phoenix Bd. Of Realtors, Inc. v. Dep't of Justice*, 521 F. Supp. 828, 832 (D. Ariz. 1981) (the government should negotiate to narrow scope of a CID when compliance may be overly burdensome). Thus, administrative agencies may not use their subpoena powers to go on fishing expeditions. *FDIC v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997); *FTC v. Nat'l Claims Serv., Inc.*, No. S. 98-283, 1999 WL 819640, at * 1 (E.D. Cal. Feb. 9, 1999). *See also* S. Rep. No. 96-500 at 1105, 96th Congress 1st Session (1979) ("The FTC's broad investigatory powers have been retained but modified to prevent fishing expeditions undertaken merely to satisfy its 'official curiosity.'"). "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924).

Upon applying the *Morton Salt* standard to the CID at issue here, there can be no doubt that the CID must be quashed. To begin with, for a variety of reasons the CID is invalid. *See* Part I below. In addition, the CID is wildly indefinite in numerous respects, is not reasonably relevant to the WHR Investigation in numerous other respects, is for the most part nothing more than a fishing expedition, and—perhaps worst of all—would impose an enormous burden on Wyndham that cannot possibly be justified when one considers the voluminous amount of information and documents that WHR has already provided to Staff, the paucity of the evidentiary record that the WHR Investigation has generated regarding possible Section 5 violations on the part of WHR, and the triviality of the one (and only) Section 5 violation that Staff believes (wrongly) the WHR Investigation has thus far uncovered. *See* Part II below.

I. THE CID IS INVALID

For a variety of reasons, the CID is invalid and, accordingly, must be quashed under *Morton Salt*. To begin with, the CID is not predicated on a Commission-adopted investigational resolution of notio18Cationa 83 0 TD-.000lUpn up(i)]Ty(reD-.ber2T*.001 Tc.036rTJ-D-.0115 TD.0ty u00lUpr

Part I.A below. Second, issuance of the CID was not predicated on the showing of need for compulsory process that is a necessary prerequisite for any use of compulsory process in an FTC investigation. *See* Part I.B below. Third, in issuing the CID the FTC did not meet its obligation, under its own regulations, to advise Wyndham in the CID itself of the purpose and scope of the investigation, the nature of the Wyndham conduct believed by Staff to have violated Section 5,

which is included in the CID (Exhibit 1 hereto) as an attachment. However, whatever FTC investigation may have been the subject of the January 2008 Resolution, that investigation certainly *was not* the WHR Investigation. The January 2008 Resolution nowhere even makes mention of the WHR Investigation, or of the Intrusions, or even of Wyndham. Nor could it have done so, for the first Intrusion did not even begin until June 2008, six months *after* the January 2008 Resolution was approved by the Commission. As of January 2008, then, there was nothing for the FTC to investigate in regard to WHR's information security practices. Indeed, the WHR Investigation was not commenced until 2010, as shown by the WHR Investigation's seven-digit

satisfied by means of a resolution that does not even *mention* (much less authorize the use of compulsory process in) the particular investigation in which the CID was issued. To begin with, such a reading flies in the face of the unambiguous language of these provisions themselves, which language expressly states that the Commission can only adopt a resolution authorizing compulsory process "in [a] matter under investigation," 16 C.F.R. § 2.4—not "in [a] matter that may some day come under investigation." In addition, reading these provisions to be satisfiable by means of "blanket" investigational resolutions would utterly defeat the legislative purpose behind the investigational resolution requirement. Congress enacted Section 20(i) as part of the Federal Trade Commission Improvements Act of 1980. The Senate Report accompanying that bill makes clear that two key objectives of Section 20(i) were "to limit the practice of the Commission of giving a vague description of the general subject matter of the inquiry" and to ensure that the Commission "take[s] very seriously its obligation to demand information only where the information is not available through other means." *See* S. Rep. No. 96-500, at 1125, 27. Plainly, there is no way for the Commission to meet these congressional objectives by means of "blanket" investigational resolutions, because the Commission cannot possibly include in a blanket investigational resolution anything more than "a vague description of the general subject matter of the inquiry" and cannot in adopting a blanket resolution give even the slightest consideration (much less "take seriously") whether the information that any given respondent will be compelled to produce pursuant to the resolution "is not available through other means." To the contrary, the only way the Commission can meet the congressional objectives that underlie the investigational resolution requirement is if the Commission, when called upon to satisfy its statutory duty to ensure that any use of compulsory process in a Staff investigation must always be predicated on an investigational resolution adopted by the full Commission, discharges that duty by evaluating *the particular investigation in question*

nothing more than a *topical* limitation on the investigation with respect to which that resolution purports to authorize the use of compulsory process. *See* January 2008 Resolution (included in Exhibit 1 hereto) (authorizing use of compulsory process in an investigation to determine whether unnamed persons have committed deception- or unfairness-based Section 5 violations "related to consumer privacy and/or data security"). Moreover, that topical limitation really operates as no limitation at all, for in net effect the January 2008 Resolution purports to authorize the Bureau of Consumer Protection's Division of Privacy and Identity Protection to conduct a five-year investigation of any matter within its jurisdiction, during which investigation it can use compulsory process whenever it feels like doing so. As such, the January 2008 Resolution bears no resemblance at all to the sort of "blanket resolution" that the Operating Manual claims (wrongly) might permissibly be used as the predicate for issuance of a CID.

The FTC also acknowledges in the Operating Manual that "[i]nvestigational resolutions must adequately set forth the nature and scope of the investigation." Operating Manual § 3.3.6.7.4.1. This requirement stems from the welter of judicial authority holding that a court may only look to the purpose and scope of an investigation as described in the investigational resolution to determine propriety of a CID predicated on that resolution. *See*, *e.g.*, *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) ("[T]he validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence" (citing *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)));

investigation related to unauthorized access to the computer network of Wyndham Hotels and Resorts, LLC"). Since by Staff's own acknowledgment the CID was not issued in the investigation referenced and identified in the January 2008 Resolution, the very terms of the January 2008 Resolution preclude the January 2008 Resolution from serving as a valid predicate for the issuance of the CID. That being the case, and there being no Commission-approved investigational resolution of any kind with respect to *the WHR Investigation*, there is no valid predicate for the CID, whether or not the January 2008 Resolution might be thought to be a valid predicate for compulsory process that might be issued in the investigation referenced in that particular resolution.

In sum, for all the foregoing reasons, the January 2008 Resolution is entirely different from those investigational resolutions that have passed muster in the courts. For example, in *FTC v. O'Connell Assocs., Inc.* 828 F. Supp. 165, 167 & n.1 (E.D.N.Y. 1993), the 1990 investigational resolution on which the FTC's CIDs were predicated was an omnibus resolution (not a blanket one) authorizing an ongoing investigation into the consumer credit reporting industry, and the tip that the FTC received in 1992 that led to the issuance of the CIDs was generated as part of that *same* investigation. Here, in contrast, there is no suggestion that the CID was issued as part of what the January 2008 Resolution describes as a generic investigation into "consumer privacy and/or data security" violations being conducted by the Bureau of Consumer Protection's Division of Privacy and Identity Protection over a five-year period. To the contrary, it is undisputed that the CID was issued in an entirely different Staff investigation of one particular company's information security practices, and that the Commission has never approved an investigational resolution as to *that* investigation. Moreover, even if the CID had been issued in the investigation described in the January 2008 Resolution, permitting that resolution to serve as a valid predicate for the CID would mean that the Commission has the authority to grant the Bureau of Consumer Protection's Division of Privacy and Identity Protection what amounts to a blank check to utilize compulsory process whenever and wherever it so desires during a five-year period. This reading of Section 20(i) of the FTCA and Sections 2.4 and 2.7 of the Rules of Practice would fly in the face of the language of those provisions, ignore the FTC's own interpretation of that language, and eviscerate the investigational resolution requirement that Congress put in place precisely to protect against the Commission's compulsory process authority being used in the abusive fashion that occurred here.

B. The CID Was Not Issued Based on the Required Showing of Need for Compulsory Process to Be Used in the WHR Investigation

As noted above, Section 20(i) of the FTCA expressly prohibits any compulsory process from being issued in an FTC investigation unless (i) the full Commission has adopted an investigational resolution authorizing the use of compulsory process in the context of that particular investigation and (ii) a Commissioner has in turn approved the particular form of compulsory process that Staff is proposing to propound pursuant to that investigational resolution.[12] Congress included Section 20(i) in the Federal Trade Commission Improvements Act of 1980 for the precise purpose of "curtail[ing] the issuance by the Commission of overly

[12] "Notwithstanding any other provision of law, the Commission shall have no authority to issue a subpoena or make a demand for information . . . unless such subpoena or demand for information is signed by a Commissioner acting pursuant to a Commission resolution. The Commission shall not delegate the power conferred by this section to sign subpoenas or demands for information to any other person." 15 U.S.C. 57b-1(i).

Operating Manual the only legitimate reasons fo

the CID had he or she appreciated the rampant overbreadth of the CID in making inquiries into the information security practices of WHR's affiliates and service providers, the pervasive duplicativeness of the CID's repeated requests for information and documents that WHR has already provided in its response to the Access Letter and subsequent Staff requests, and the multi-million-dollar financial burden compliance with the CID would place upon Wyndham, on top of the millions of dollars of out-of-pocket costs Wyndham has already incurred in voluntarily cooperating with the WHR Investigation. *See* pages 5-6 above.

Finally, and most important, any Staff memorandum seeking authorization to use compulsory process in the course of the WHR Investigation, whether submitted in seeking authorization to institute the investigation or adoption of an investigational resolution or issuance of the CID, could not possibly have presented the statutorily required justification for the use of compulsory process. As described above, WHR made exhaustive efforts over sixteen months to comply fully and voluntarily with the numerous discovery requests contained in the Access Letter and in Staff's subsequent communications. Staff has never once suggested that those efforts were in any way inadequate to meet Staff's investigatory objectives. *See* page 6 above. Moreover, Staff never once made any effort to obtain voluntarily from Wyndham any of the information and documents requested by the CID. *See* page 22 above. Given these indisputable facts, no Staff memorandum could have possibly satisfied the Commission's statutory obligation to "require Commission staff to explain why the information [sought by a CID] is not available through alternative (voluntary) means." S. REP. NO. 96-500, at 1127. Certainly nothing has occurred in the course of the WHR Investigation to support any claim by Staff, or any finding by the Commissioner who issued the CID, that issuance of the CID was, in the words of the Operating Manual, necessary so as "to avoid delay, to obtain testimony under oath, to obtain evidence from persons who will not or who [S]taff believe will not provide complete information voluntarily, or to prevent destruction or withholding of evidence and preserve the Commission's legal remedies against any such destruction or withholding." Operating Manual § 3.3.6.7.2.

In sum, there is nothing in the record to justify a finding by the Commission, in deciding Wyndham's instant petition to quash the CID, that issuance of the CID was predicated on a proper showing by the Staff, or a valid finding by the Commissioner who issued the CID, that the statutory and regulatory requirements for use of compulsory process in the WHR Investigation in general, and for issuance of the CID in particular, were satisfied here. With Staff and the Commission both having failed to follog TD. ,218.74 0 TD.0001 Tc.3649 T[(e Co3(is

As noted above, one of the key congressional objectives in enacting the Federal Trade Commission Improvements Act of 1980 was to "limit the practice of the Commission of giving [targets of compulsory process] a vague description of the general subject matter of the inquiry." *See* S. REP. NO. 96-500, at 1125. In place of that practice, Congress intended that upon passage of the statute "[a] civil investigative demand would have to . . . state the nature of the conduct of the alleged violation under investigation and the law applicable thereto." *Id*. at 1105. The Senate Report explained that the reason for imposing this obligation on the Commission in connection with issuing a CID was not only to accord basic fairness to the recipient of a CID, but also to ensure that every CID "provides a standard by which relevance may be determined" both by the recipient and by a reviewing court in evaluating the propriety of the CID. *Id*. at 1125. As aptly stated by Congressman Coughlin during the House of Representatives debate on the bill:

> We need to protect American business from overbroad investigative subpoenas demanding the production of great quantities of information and documents with no requirement that these demands be relevant to some suspected violation. . . . The Commission's powers of visitation and subpoena are awesome powers that require reasonable safeguards against abuse. The Senate will soon mark up a bill which would curb this subpoena power by requiring that the Commission specify the conduct they are investigating and why the Commission believes that the conduct violates the law. This would force the Commission to draft narrower and more reasonable subpoenas, and also establish criteria for judicial review of these

seeks to satisfy Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice by cross-referencing an investigational resolution adopted by the Commission, the investigational resolution has to at least provide a "basis for determining the relevancy of the information demanded." *See FTC v. Carter*, 636 F.2d at 787-88. The investigational resolution at issue in *Carter*

in turn, on (i) how the scope of the investigat

documents by which Staff requested, and the Commission and/or the Bureau Director then granted, Staff the authority first to institute and later to expand the WHR Investigation. Thus, during the course of preparing its instant petition to quash, Wyndham asked Staff to provide Wyndham with these very documents. *See* Exhibit 13 hereto. Staff refused to do so, however, even after Wyndham detailed its reasons for requesting those documents. *See* Exhibits 14 and 15 hereto. Thus, while Wyndham is confident that a reviewing court would order Staff to produce those documents to Wyndham in the event the Commission were ever to seek judicial enforcement of the CID, at least for now the documents by which Staff requested that it be given authority, and the Commission and/or the Bureau Director granted Staff authority, first to institute and later to expand the WHR Investigation are not available to assist in determining how the scope of the WHR Investigation was defined by the Commission and/or the Bureau Director.

With Staff having failed to include any description of the scope of the WHR Investigation in the CID and having refused to provide the internal Commission documents that would operate to define the authorized scope of the WHR Investigation, Wyndham is aware of one and only one document that both is currently available for review and purports to describe the authorized scope of the WHR Investigation: the Access Letter. According to the very first sentence of the Access Letter, Staff was "conducting a non-public investigation into *Wyndham Hotels and Resorts, LLC's* [defined by the Access Letter as "Wyndham"] compliance with federal laws governing information security." Exhibit 3 hereto at page 1 (emphasis added). The Access Letter explained in its next sentence that the concern giving rise to the investigation was that "sensitive personal information (including credit card information) of *Wyndham's customers* was obtained from Wyndham's computer networks by unauthorized individuals." *Id*. (emphasis added). Thus, according to the Access Letter's third sentence, Staff was seeking "to determine whether *Wyndham's* [i.e., WHR's] *information security practices* comply with Section 5 of the Federal Trade Commission Act." *Id*. (emphasis added).

In other words, according to Staff's own description of the WHR Investigation as set forth in the first three sentences of the Access Letter, the investigation Staff had been authorized to conduct involved *WHR's* information security practices and *WHR's* compliance with Section 5 —not the information security practices or the compliance with Section 5 of WHR's affiliates or WHR's service providers. Moreover, per the Access Letter the focal point of the investigation was WHR's alleged failure to protect personal information of WHR's *customers*—not an alleged failure by WHR to protect personal information of WHR's *employees*. Further, at no point since its receipt of the Access Letter has WHR received any documentation from Staff advising WHR that the WHR Investigation had been expanded, beyond the scope set forth in the Access Letter, to extend to the protection of employee data by WHR or its affiliates or to the information security practices of WHR's affiliates and/or service providers. Nor has WWC or any other WHR affiliate ever received any documentation from the Commission as required by Section 3.3.6.1 of the Operating Manual notifying such entity that it had become a proposed respondent in the WHR Investigation.

In short, the documentary record that is available for review as to how the scope of the WHR Investigation has been defined by the Commission and/or the Bureau Director compels the conclusion that Staff has *never* been authorized by either the Commission or the Bureau Director to investigate the protection of employee data by WHR and its affiliates or to investigate the

information security practices of WHR's affiliates and/or service providers. The conclusion that

violated, Section 5, not consent orders, defines the CID's proper scope. Second, to the extent these consent orders could somehow inform an interpretation of Section 5—which they could not—they in fact show that employees are *not* consumers within the meaning of the FTCA. By defining "consumers" to include "employees" "*for the purpose of*" a consent order, they, like the definition of "personal information" contained in the CID (*see* note 9 above), effectively concede that for *other* purposes—i.e., under the standard meaning that applies under Section 5—employees are *not* consumers. Otherwise, there would be no need to artificially add "employees" to the definition.

Because employees are not "consumers" for purposes of the FTCA, the FTC has no investigatory jurisdiction with regard to acts or practices that affect persons in their capacities as employees. Given the FTC's lack of any basis to assert investigatory jurisdiction over conduct respecting employees, the CID's pervasive effort to obtain information and/or documents relative to how WHR and its affiliates handle employee data (*see* note 9 above) would be invalid even if the Commission and/or the Bureau Director had purported to authorize the WHR Investigation to extend to such matters (which, as discussed in Part I.E.1 above, evidently did not occur). For this reason as well, then, Staff's attempt to use the CID to investigate to how WHR and its affiliates handle employee data (which would seem to be a rather transparent, and feeble, effort by Staff to circumvent Staff's clear inability to show any substantial *consumer* injury as a result of the Intrusions, *see* page 3 above) is invalid. The CID must therefore be quashed to the extent it seeks information and/or documents relative to how WHR and its affiliates handle employee data.[17]

II. THE CID MUST BE QUASHED BECAUSE IT IS OVERBROAD, UNDULY BURDENSOME, AND TOO INDEFINITE

Even if the CID were a valid exercise of FTC authority (which, as shown in Part Ilo. orc./TT4 142 -11 a

II.C below.[18]

A. The CID Is Pervasively Overbroad Because Request After Request Seeks Information Not Reasonably Related to the WHR Investigation

An agency subpoena or CID will not be enforced if it demands information that is not "reasonably relevant" to the inquiry. *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citing relevance as one of three bases for quashing CID). In this case, every single one of the 89 interrogatories and 38 document requests contained in the CID seeks information or documents that are well beyond the scope of the WHR Investigation and/or are not reasonably designed to discover whether WHR violated Section 5. Most notably, many of the requests seek information or documents regarding information security practices of WHR's corporate affiliates WWC, WHM, and WHG[19] despite the fact that Staff has not pointed (and cannot point) to a shred of evidence indicating that any of these entities violated Section 5 or that any of their networks suffered from information security deficiencies. In fact, Staff's sole argument in defense of the requests addressed to the information security practices of WHR's affiliates is that WWC and WHG are relevant because they provided information technology and security services to WHR and WHM is relevant because it provided information security services to the managed Wyndham-branded hotels. *See* Exhibit 11 at 2 (Staff letter noting that WHR's affiliates are relevant because information security services were provided to WHR by WHG and later by WWC, and to the managed Wyndham-branded hotels by WHM, but failing to state any reason why information or documents related to the separate information security programs of these entities themselves, and unrelated to information security at WHR or the Wyndham-branded hotels, are relevant to the WHR Investigation). Wyndham has never contested the relevance of documents or information in the possession of WHR's affiliates to the extent such documents or information relate to information security at WHR or the Wyndham-branded hotels. Indeed, WHR has already produced over one million pages of documents from custodians employed by WWC and WHG related to information security at WHR. WHR does contest, however, the relevance to the WHR Investigation of documents or information that has nothing to do with information security at WHR or the Wyndham-branded hotels and instead relates only to information security at WWC, WHG, or WHM. Staff has offered no rationale for the CID's demand for documents and information of *that* sort. *See* Exhibit 11. Accordingly, the portions of the CID that seek discovery regarding information security practices at WWC, WHG, and WHM that do not involve WHR's or the Wyndham-branded hotels' information security should be stricken.

The CID is overly broad in several material respects beyond the requests that target WHR's affiliates. For example, the CID seeks documents generated during, and information relative to, the period from January 1, 2008 to present, *see* Exhibit 1, Instruction C, despite the fact that WHR had fully remediated the security incidents experienced at the Wyndham-branded hotels by May of 2010. Staff has no reason to believe that documents generated during, or information relative to, the period between May of 2010 and December of 2011 would be

[18] Wyndham hereby incorporates each of the objections stated in Exhibit 16 into this Petition.

[19] See Exhibit x hereto, Interrogatories 5, 6, 7, 8, 12, 13, 14, 16, 17, 18, 19, 20, and 21, and Document Requests 3, 6, 7, 8, 9, 10, 12, 13, and 16.

reasonably likely to shed light on WHR's information security practices at the time of the Intrusions (the first of which began in June 2008 and the last of which ended in January 2010).

requests makes clear that Staff has two particular entities in mind.[20]

Discovery requests such as Interrogatories 12 and 14 and Document Requests 6 and 8 are precisely the type of inappropriate exertions of agency power that the Federal Trade Commission Improvements Act of 1980 sought to prohibit. *See* S. REP. NO. 96-500 (1979) at 1105 ("The FTC's broad investigatory powers have been retained but modified to prevent fishing expeditions undertaken merely to satisfy its 'official curiosity. . . .'"); *see also* Statement of Congressman Shumway, 125 CONG. REC. 32,456 (1979) (noting need to "eliminate" the "propensity for the FTC to engage in 'fishing expeditions'"); Statement of Congressman Coughlin, 125 CONG. REC. 32,458 (1979) (stating that goal of bill was to "curb this subpoena power by requiring that the Commission specify the conduct they are investigating and why the Commission believes that the conduct violates the law."). These requests accordingly should be stricken, along with all the other requests in the CID that suffer from the same defect of having been drafted without any effort being made to zero in on a particular activity with respect to which Staff has a genuine concern, based on its investigation to date, of having involved a Section 5 violation.[21]

The inappropriate and unnecessary overbreadth of the CID's requests is underscored by the fact that WHR has already expended significant time, and incurred out-of-pocket costs in excess of $ 5 million in drafting written responses to 51 separate questions posed by Staff, preparing oral presentations addressing an additional 29 Staff questions, and locating and producing over 1,010,000 pages of documents in response to 29 separate Staff document requests. *See* Neff Declaration, Exhibit 4, at¶ 8; Meal Declaration, Exhibit 2, at ¶¶ 5-6 and Exhibit A. Thanks to those extensive efforts on WHR's part, Staff now has in its possession, for example, over 60 detailed forensic reports regarding the nature and suspected causes of the Intrusions. With that sort of information already in hand, Staff has no reason or need to be fishing about blindly for any and all information and documents that might be out there related to

[20] According to Staff, the CID's broad requests addressing the activities of any and all WHR Service Providers are appropriate because "one of the breaches occurred due to the compromise of a third-party administrative account" and because "the first two breaches involved the intruder accessing files on the Wyndham-branded hotels' networks . . . [that] were created as a result of the hotels' property management systems and/or payment processing applications being left in 'debugging' mode at the time they were installed on the hotels' networks by a service provider." See Exhibit 11 hereto, at 2. To begin with, since neither of the entities referenced by Staff in defending these particular requests was actually a WHR Service Provider as defined in the CID (because neither entity was permitted access to personal information, and because the second entity did not even provide services to WHR or its affiliates, see Exhibit 1 hereto, Definition V), the entire premise of Staff's argument is factually incorrect. But even were that not the case, the circumstances described by Staff would hardly begin to justify a wholesale investigation of the activities of each and every one of WHR's Service Providers. Rather than creating the basis for a fishing expedition of that sort, those circumstances would at most justify a further, targeted Staff inquiry into the activities

each and every one of WHR's information security practices, including those practices with respect to which there is no reason for Staff to have any concern at all about their having created a risk to consumer data. Instead, what Staff should be doing at this juncture is crafting targeted requests that are drafted to seek with precision whatever limited additional information Staff truly requires at this late date to complete whatever remains of its longstanding investigation. Because the vast majority of the CID's discovery requests were not drafted in this targeted fashion, the CID should be quashed in its entirety or, at a minimum, the non-targeted requests should be stricken.

least $2.75 million.[26] *See* Neff Declaration, Exhibit 4, ¶ 12.

Asking Wyndham to invest that amount of time and money in responding to the CID would be utterly indefensible when one considers that this expenditure would be made on top of the 16 months and $5 million WHR has already spent cooperating with the WHR Investigation, and that Staff's supposed case against WHR based on the WHR Investigation involves just a single alleged Section 5 violation that is marginal at best on the merits and in any event caused no consumer injury. Moreover, there is no reason to think that Wyndham's compliance with the CID would improve the flimsy case Staff believes it has made. For example, WHR has already produced over one million pages of electronic documents[27] to Staff from two custodians who were at the heart of dealing with WHR's information security in general and its investigation and remediation of the Intrusions in particular. To date, however, Staff has not once in the course of the WHR Investigation cited to a

what evidence Staff might adduce through the CID of security vulnerabilities at WHR or the Wyndham-branded hotels, Staff still would have no way of demonstrating the substantial consumer injury that would be the linchpin of any such claim. In short, the huge cost Wyndham would incur in responding to the CID is completely disproportionate to any investigatory value the CID could possibly have to the WHR Investigation.

The CID is also unduly burdensome in that it repeats, in whole or in part, numerous discovery requests to which WHR has already responded during the course of the WHR Investigation. Specifically, Wyndham's review of the Access Letter and the additional Staff questions answered by WHR during the course of the WHR Investigation reveals that WHR has already been asked, in whole or in

U.S.) (confirming that "[t]o obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met"). A CID is deemed "too indefinite" when it fails to "describe each class of material to be produced with such definiteness and certainty as to permit such material to be fairly identified." 11 C.F.R. 2.7(b)(1); Operating Manual, § 3.3.6.7.5.3(1). Here, as described below, many of the CID's requests were drafted without any attention having been given to the generality of the request, the level of detail demanded by the request, or the lack of clarity of the request. Because those requests therefore were not drafted so as to permit the requested material to be "fairly identified" by Wyndham, each of those requests should be stricken.

To begin with, many of the requests in the CID manage to seek information or documents both at a very high level of generality and, at the same time, at an extreme level of detail. For example, Interrogatory 3 seeks information as to "how the Wyndham-branded hotels' networks are connected to any Company network(s)"—a broad question, particularly given that "connected" is not defined to be limited to be via computer or internet. The request appears to encompass both a listing of databases and systems on the computer networks of the Wyndham entities that can be accessed from the Wyndham-branded hotels and the specific technology used to make these connections. The Interrogatory then asks for a number of pieces of information, several of which go beyond the question of how the networks are connected to inquiring about security of information in certain databases and systems: "whether and how the Wyndham-branded hotels may access the central reservation system(s) or guest loyalty database(s)," "the personal information contained in each", "any access controls in place to limit access to the central reservation system or guest loyalty database." Interrogatory 3, therefore, asks Wyndham to narrate for Staff any and all knowledge it has regarding connections between any Wyndham entity and the Wyndham-branded hotels, without focusing on any specific system or database or other means of connection relevant to this case. A request like that does not come close to describing the information or documents being requested with "with such definiteness and certainty as to permit such material to be fairly identified." Interrogatory 3 therefore must be stricken as being "too indefinite," as must Interrogatories 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, and 21, and Document Requests 2-7 and 9-17, all of which suffer from this same sort of indefiniteness as to exactly what information or documents the request in question is asking to be provided.[30]

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the accompanying Exhibits, Wyndham respectfully requests that the Commission quash or, alternatively, limit the CID as set forth above.

[30] The CID is also "too indefinite" by reason of the lack of definiteness and clarity created by the CID's use of definitions that vary the standard English meaning of terms like "document", "identify", and "relating to" to have something other than their standard English meanings. See CID (Exhibit 1 hereto), Definitions J, O, and U. These definitions therefore should likewise be stricken.

CERTIFICATE OF SERVICE

I hereby [illegible] on January 20, 20[illegible] (12) [illegible]

[illegible] with attached exhi[illegible]ts to be ha[illegible] delivered to the Secretary of the Federal Trade [illegible]

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[illegible]ington, D.C. 20580

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